

PART A

PRELIMINARY MATTERS

Chapter 1

INTRODUCTION

Terms of reference

1.1 On 24 September 1981 the Senate passed the following motion:

That the following matter be referred to the Standing Committee on Constitutional and Legal Affairs: An examination of the feasibility, whether by way of constitutional amendment or other legal means, of securing a compact or 'Makarrata' between the Commonwealth Government and Aboriginal Australians.¹

Conduct of inquiry

1.2 In early October 1981 the Committee lodged advertisements seeking submissions on the reference in newspapers and magazines throughout Australia. Letters were also sent to individuals and organisations, both Aboriginal and non-Aboriginal, seeking submissions. We received 35 submissions and these are listed in Appendix 1. During the course of the inquiry the Committee held 19 public hearings and many people who made submissions subsequently appeared as witnesses before the Committee. We here record our appreciation for the time and effort they have made to assist us in the inquiry. A list of witnesses is contained in Appendix 2.

1.3 At the beginning of its consideration of the reference, the Committee comprised Senators Alan Missen, Gareth Evans, Noel Crichton-Browne, Robert Hill, Susan Ryan and Michael Tate. With

he commencement of the new Parliament, Senators Gareth Evans, Noel Crichton-Browne and Susan Ryan were replaced by Senators Nick Bolkus, Robert Cook and Austin Lewis. The new members of the Committee did not have the opportunity to take evidence from various groups and Aboriginal communities around Australia, apart from a major public hearing held in Canberra. Indeed, the Committee as a whole had its inquiry disrupted by the calling of the federal election early in 1983. While the Committee, and particularly its new members, could have benefitted from a further round of meetings, including return visits to various parts of Australia, that has not proved possible given our obligation to report to the Senate in a timely way.

1.4 It is for the Aboriginal people to decide whether some form of major agreement of the kind contemplated by the National Aboriginal Conference (NAC) and promoted by the recently disbanded Aboriginal Treaty Committee (ATC) is the best means to achieve their aims. The NAC is an elected Aboriginal body which represents Aboriginal and Torres Strait Island people at the political level. The ATC was a non-Aboriginal body, the purpose of which was to raise interest in and promote knowledge of the idea of a compact in the non-Aboriginal community.

1.5 The central issue to decide is whether some form of major agreement ought to be pursued. Clearly such an agreement would only succeed if it were understood and supported throughout the whole Australian community. As to the Aboriginal community, there needs to be a comprehensive consultative process throughout Australia, a thorough understanding and systematic consideration of the legal issues involved and of the various options available to achieve legal implementation of any final agreement, a clear accord as to the objectives of the agreement, the securing of proper representational processes and of a timetable for implementation. The relevance of these issues to the narrower question of legal feasibility became apparent during the course of the inquiry and we hope that this report will provide some assistance in these matters as well.

1.6 The Committee is primarily concerned with the legal feasibility of implementing a compact between the Commonwealth and Aboriginal Australians. Questions in this area include whether the Aboriginal people's claim to sovereignty can be upheld, whether a compact with constitutional backing is desired and, if so, whether the full text or just a broad enabling power should be included within the Constitution. Other issues to be considered are whether the compact should be supported by legislation based on the Commonwealth's existing constitutional authority or should take the form of a simple agreement or contract. The question of who should be the parties to the proposed compact also needs to be considered. A further issue is whether there should be one or several separate agreements.

1.7 To enable the Committee to consider these questions, wide-ranging evidence was taken in an informal way from Aboriginal and Torres Strait Island communities living in tribal, semi-tribal or fringe-dwelling situations. The Committee visited communities in the Northern Territory, Torres Strait, North Queensland, Central Australia and the Kimberley region of Western Australia. Our purpose in making these visits was to inform ourselves at first hand as to what matters should be covered in a compact and who should represent the Aboriginal people. In the course of these visits the level of knowledge about the proposed compact became apparent. While some communities had some awareness of the compact, in others knowledge of the idea was almost non-existent.² Much of the value of these visits lay in the insights they provided to the Committee into the daily concerns of Aboriginal existence. Evidence was also taken in a more formal way from Aboriginal people living in an urban environment, members of Aboriginal organisations and academics.

1.8 During these visits to Aboriginal communities, the Committee was at pains to make it clear that its role was not to promote the treaty concept. Rather it saw its function as one of bringing knowledge of the concept and of the problems associated with its implementation to the attention of the Parliament and Government.

1.9 In accepting this reference the Committee was conscious of the many delicate issues involved in conducting an inquiry in pursuit of it. By our analysis of the legal issues which must be confronted if it is thought desirable to conclude such a compact, we hope to create a rational framework within which debate about the options for reaching an agreement and the form of the agreement can be advanced. We have made it clear during the course of numerous public hearings that we see our role as one of sorting through issues which, although important, are essentially subsidiary to the major issue of whether some form of agreement between Aboriginal and non-Aboriginal Australians should be concluded. The Committee also emphasises the need for wide ranging political discussion between Aboriginal and non-Aboriginal Australians on the desirability of concluding some formal expression of mutual commitment.

Endnotes

1. Australia, Senate, Journals, p. 531.
2. Evidence, pp. 114, 133.

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